Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

FCC 95-476

In the Matter of	)	
	)	Transmittal Nos. 2433 and 2449
Southwestern Bell Telephone Company	)	
	)	CC Docket No. 95-140
Tariff F.C.C No. 73	)	

ORDER TERMINATING INVESTIGATION

Adopted: November 28, 1995 ; Released: November 29, 1995

By the Commission:

I. INTRODUCTION

1. On August 25, 1995, the Common Carrier Bureau (Bureau) released an Order Designating Issues for Investigation in connection with Southwestern Bell's (SWB) "Request for Proposal" (RFP) tariff filed under Transmittal Nos. 2433 and 2449.[1] By this Order, we conclude our investigation of SWB's proposed RFP provisions for its access services. In general, for the reasons discussed below, we conclude that SWB has failed to demonstrate that the RFP provisions are lawful under our rules and Section 202(a) of the Communications Act, 47 U.S.C. § 202(a). We therefore direct SWB to remove these provisions from its tariff.

II. BACKGROUND

2. On February 27, 1995, SWB filed Transmittal No. 2433 to add to its access tariff a new section 29, entitled "Request for Proposal." This tariff section purports to establish how SWB will respond to RFPs from its customers. As originally filed, SWB listed MCI Telecommunications Corporation (MCI) as a customer issuing RFPs. On April 24, 1995, SWB filed Transmittal No. 2449 to clarify the general availability of the offering to similarly situated customers and to remove references to MCI, which had withdrawn its RFPs. SWB, however, retained as part of the tariff language the rates that it had proposed to provide to MCI in response to those RFPs.

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[1] Southwestern Bell Telephone Company tariff F.C.C. No. 73, Order Designating Issues for Investigation, DA 95-1867, CC Docket No. 95-140 (rel. August 25, 1995)(*Designation Order*).

3. In its proposed tariff language, as amended, SWB describes a RFP rate as its response to customer RFPs submitted to SWB in "competitive bid situations." The tariff requires that customers indicate in their RFP that the request involves a "competitive bid situation" in order to avail themselves of the rates that SWB will file in Section 29.3. In addition, the tariff states that the rates quoted to a customer in response to a RFP are available to any similarly situated customer that submits a RFP requesting the same service in the same quantities and at the same central office(s). SWB does not name any competitors or potential customers in the tariff, but includes the rates and charges in the tariff for the two specific offerings that were developed in response to MCI's RFPs that later were withdrawn. The language of the tariff, as set forth below, therefore consists of both general language authorizing SWB to file RFP rates and the specific rates and terms proposed to respond to MCI's RFPs. Significantly, this specific rate and term language does not limit SWB's authority to propose different rates and terms in response to subsequent RFPs.

4. Specifically, the proposed RFP tariff provisions, as amended, consist of three subsections. Section 29.1 of SWB's tariff filing reads as follows:

> This section contains . . . [SWB's] response to customer requests for proposal submitted to SWB in competitive bid situations. The facilities utilized to provide these services are the same type as that used by the Telephone Company in furnishing its other tariffed services....[2]

Section 29.2 of the tariff, Rate Regulation, provides that:

> Customers must indicate in their RFP that the request involves a competitive situation in order to avail themselves of SWB's application-specific rates. The rates quoted to a customer in response to a RFP are available to any similarly situated customer that submits a RFP requesting the same service in the same quantities and at the same Central Office(s).[3]

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[2] SWB Transmittal No. 2433, Tariff F.C.C. No. 73, section 29.1.

[3] SWB Transmittal No. 2449, Tariff F.C.C. No. 73, section 29.2. Prior to SWB's amendment to the tariff language, Section 29.2 read:

> Customers must indicate in their RFP that the request involves a competitive situation in order to avail themselves of SWB's application-specific rates. Otherwise, averaged tariff rates will apply for the requested service.

SWB Transmittal No. 2433, Tariff F.C.C. No. 73, section 29.2.

Section 29.3 of the tariff, Rates and Charges, provides that:

> The rates, charges and additional regulations, if applicable, are provided in accordance with 29.1 preceding and are listed as follows:

Description	Monthly Rate	Nonrecurring Charge
8 DS3s between two customer premises each served by the Jackson Central Office in Topeka , Kansas	$23,089.85	
Case Preparation Charge		$1,150.00
15 DS3s between a customer premises served out of the Chestnut Central Office, St. Louis, Missouri and a customer premises served from the Ladue Central Office Ladue, Missouri	$26,823.70	
Case Preparation Charge		$1950.00[4]

5. In the Description and Justification (D&J) submitted with Transmittal No. 2433, SWB states that it received a request from MCI for a "competitive response" to two RFPs for service through SWB's interstate access tariff. SWB claims that none of the policies in the Commission's *DS-3 ICB Order*, or elsewhere, prohibit SWB from responding to a customer with an application-specific rate package at non-tariff rates, and that competitive conditions justify this tariff filing.[5] SWB interprets the Commission's *DS-3 ICB Order* as permitting

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[4] SWB Transmittal No. 2449, Tariff F.C.C. No. 73, section 29.3. Prior to SWB's amendment to the tariff language, Section 29.3 also included the name of MCI under a subheading for "customer." The amendment removed references to MCI after MCI withdrew its RFP.

[5] SWB D&J at 2 *citing* Local Exchange Carriers' Individual Case Basis DS-3 Service Offerings, Memorandum Opinion and Order, 4 FCC Rcd 8634 (1989) (*DS-3 ICB Order*). In its *DS-3 ICB Order*, the Commission found that ICB pricing of DS3 service will be presumed discriminatory but that discrimination that results from ICB pricing of a very limited number of DS3s as a transitional mechanism is not unreasonable. The Order also stated that although the LECs frequently invoke "competitive necessity" as a justification for ICB pricing, none of the carriers had made a showing of competitive necessity that meets the Commission's requirements. *DS-3 ICB Order*, 4 FCC Rcd 8634.

individually negotiated contract rates whenever there exists "competitive necessity," as defined in the Commission's *Private Line Guidelines Order*.[6] SWB claims that its offering satisfies the requirements for "competitive necessity," as set forth in the *Private Line Guidelines Order* and, therefore, a waiver of the *DS-3 ICB Order* is not necessary.[7]

6. MCI, the Association for Local Telecommunications Services (ALTS), Teleport Communications Group, Inc. (TCG), AT&T, and Sprint Communications Company, L.P. (Sprint) filed petitions opposing the SWB transmittals and SWB filed a reply.[8]

7. On June 26, 1995, pursuant to its authority under Section 204(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 204(a), the Bureau released an Order that suspended for five months the RFP tariff and initiated an investigation into the lawfulness of these tariff revisions.[9] The Bureau noted in the *Suspension Order* that the petitioners alleged, among other things, that: (1) the RFP tariff is unreasonably discriminatory under Section 202(a) of the Communications Act; (2) the RFP tariff is actually a contract type tariff, which the Commission has authorized only for limited services found to be substantially competitive; (3) the tariff language is vague and ambiguous; and (4) SWB has not demonstrated that additional pricing flexibility is warranted.[10] The *Suspension Order* specifically discussed the vagueness and ambiguity of the RFP tariff language and the apparent inconsistency between the proposed tariff and the Commission's pricing flexibility policies. In addition, the Bureau discussed SWB's competitive necessity defense and SWB's attempt to use the *DS3 ICB Order* as justification for the filing of discriminatory rates. In this context, the Bureau questioned whether the general availability of discounted competitive

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[6] *Id.* at 2, citing the *DS-3 ICB Order* at 8643. The *DS-3 ICB Order*, in finding that none of the LECs had made a showing of "competitive necessity" that meets the Commission's requirements, cites to Private Line Rate Structure and Volume Discount Practices, Report and Order, CC Docket No. 79-246, 97 FCC 2d 923 (1984) (*Private Line Guidelines Order*). The *Private Line Guidelines Order* states that a carrier's proof of competitive necessity should include a showing that: (1) an equal or lower priced competitive alternative -- a similar offering or set of offerings from other common carriers or customer-owned systems -- is generally available to customers of the discounted offering; (2) the terms of the discounted offering are reasonably designed to meet competition without undue discrimination; and (3) the volume discount contributes to reasonable rates and efficient services for all users. *Private Line Guidelines Order*, 97 FCC 2d at 948.

[7] SWB D&J at 3.

[8] Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, Transmittal Nos. 4233 and 2449, Order, DA 95-1445 (rel. June 26, 1995) (*Suspension Order*).

[9] *Suspension Order*, DA 95-1445 (rel. June 26, 1995).

[10] *Suspension Order at* ¶ 5.

offerings in the areas served by SWB is demonstrated simply by a customer's release of a request for proposals.[11]

8. On August 25, 1995, the Bureau released the *Designation Order*. In the *Designation Order*, the Bureau required SWB to file a direct case addressing the following: (1) whether the RFP tariff provisions are unreasonably vague and ambiguous; (2) whether the RFP tariff provisions are consistent with the Commission's zone density pricing policies; and (3) whether the competitive necessity test should be applied to the tariff provisions and, if so, whether the tariff provisions meet the requirements of the competitive necessity test.[12]

III. PLEADINGS

A. Vagueness and Ambiguity of Tariff Language

9. *Designation Order*. In the Designation Order, the Bureau required SWB to state "how it defines, and what standards it will use to determine, what constitutes a 'competitive bid situation.'"[13] We also required SWB to explain what constitutes a *bona fide* RFP and how its discretion in this regard would be limited. In addition, the Bureau required SWB to explain whether the access services under the tariff are limited and, if not, to identify what access services may by offered in response to a RFP. Finally, the Bureau required SWB to identify restrictions on the general availability of discounted services to be offered by it and to explain why any such restrictions are reasonable.[14]

10. *SWB's Direct Case*. SWB stated in its direct case that there is no need to create standards for a competitive bid situation because the process for bidding is already in place and is recognized and used industry-wide.[15] SWB claims that it does not have the ability to verify, and customers should not be required to disclose, information regarding other RFPs or other bidders (including the existence of such other bidders, if any). SWB states that all it can do is verify that the customer is aware of the conditions imposed by the tariff. SWB

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[11] *Suspension Order* at ¶¶ 7-11.

[12] *Designation Order*, DA 95-1867, CC Docket No. 95-140 (rel. August 25, 1995).

[13] In this context, the Bureau also asked SWB whether and how it would verify whether a customer requested other bids, whether a competitor responded to such requests, and the terms of any responses. The Bureau also ordered SWB to address whether, if no other party responds to a RFP, such circumstances would constitute a "competitive bid situation," and whether a bid from a competitor, in and of itself, constitutes a "competitive bid situation."

[14] *Designation Order at* ¶ 7.

[15] SWB Direct Case at 5.

further states that the existence of the RFP itself, whether or not other vendors choose to participate, constitutes a competitive bid situation, and that it intended "competitive bid situation" to mean that the customer has requested bids from at least one other vendor.[16] SWB further explains that if an RFP on its face states that it involves a competitive situation, it will qualify as a *bona fide* RFP.[17] SWB states that the access services available under the RFP tariff are currently limited to those contained in Transmittal No. 2433, but that it does not intend to limit the access services that may be made available under this section of the tariff in the future. SWB claims that the access services that will be made available will depend upon the services that are requested on a competitive bid basis by customers in the future. Similarly, SWB states that any restrictions that may be placed on the general availability of the services to be offered by SWB under the RFP tariff will depend upon the services requested by customers.[18]

11. *Oppositions to Direct Case*. Petitioners in their oppositions contend that SWB refuses to clarify the standards under which it will assess potential competitive situations, fails to identify the access services (including rates, terms and conditions) that would be available and the restrictions on the general availability of discounted services, and avoids answering how it will determine if a RFP is a *bona fide* RFP.[19] Petitioners allege that the resulting ambiguity allows for the manipulation of those tariffs by customers or SWB.[20] Thus, petitioners state, SWB's tariff offers no protection to either competitors or the public from unreasonably discriminatory, predatory, or otherwise anticompetitive rates established in response to sham RFPs.[21]

B. Pricing Flexibility

12. *Designation Order*. In the *Designation Order*, the Bureau required SWB to explain why its RFP tariff is not an attempt to circumvent the Commission's zone density pricing policies and why its tariff is consistent with those policies. In this context, the Bureau required SWB to explain why its RFP tariff is consistent with the Commission's statements that it would not grant LECs broader pricing flexibility, such as individualized pricing in response to competitors' offerings, at this time. The Bureau also required SWB to explain why it is reasonable to conclude that a RFP's existence establishes competition sufficient to

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[16] *Id.* at 5-8.

[17] *Id.* at 8-9.

[18] *Id.* at 9-10.

[19] AT&T Petition at 3-4; MFS Petition at 4-5; Time Warner Petition at 2-3.

[20] AT&T Petition at 3-4; MFS Petition at 4-5; ALTS Petition at 5.

[21] AT&T Petition at 3-4; MFS Petition at 4-5.

justify pricing flexibility when SWB may not have met the expanded interconnection proceeding requirement for competition for authority to implement zone density pricing or volume and term discounts. Finally, the Bureau required SWB to state whether and how RFP rates conform to the cost based pricing policies inherent in zone density pricing.[22]

13. *SWB's Direct Case.* SWB states in its direct case that the Commission has recognized that additional pricing flexibility may be justified as competition develops.[23] SWB alleges that RFP rates produce prices that are highly cost based, more so than zone density pricing.[24] SWB claims that the existence of a RFP is sufficient to justify its being able to make a competitive response because the RFP makes it clear that alternatives to SWB's service exists. SWB also claims that competition exists without expanded interconnection and that zone density pricing and volume and term pricing plans do not currently allow SWB to compete effectively in such situations.[25]

14. *Oppositions to Direct Case.* Petitioners in their oppositions claim that the Commission's price cap rules and expanded interconnection rules give LECs a substantial degree of pricing flexibility and that the Commission has determined that it is not in the public interest to give LECs the pricing flexibility that SWB now seeks. They state that the Commission's policies were adopted with two goals in mind: (1) giving LECs more freedom to compete where competition has taken hold; and (2) protecting new access providers from being foreclosed from competing because of targeted competitive offerings of LECs. Petitioners further state that the policy is to "ensure[ ] a marketplace where competitive access providers can gain a meaningful foothold prior to increased pricing flexibility for LECs."[26] Petitioners state that today, a potential competitor in the special access market can only compete if it offers a rate substantially lower than SWB's volume and term discount rate. They allege that to allow the RFP tariff now would harm the public because fewer, if any, new competitive entrants will be able to compete where SWB has succeeded in selectively lowering its prices. The petitioners characterize SWB's position as contending it should have pricing flexibility to respond to every alleged competitive threat, no matter how small or undocumented. Petitioners claim that until the Commission determines that the market for services SWB seeks to offer under its RFP tariff is substantially competitive, there is no basis

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[22] *Designation Order* at ¶ 11.

[23] SWB Direct Case at 11 (citing Expanded Interconnection with Local Telephone Company Facilities, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369, ¶ 186 (1992)).

[24] SWB Direct Case at 12.

[25] *Id.* at 14 -15.

[26] AT&T Petition at 6.

to permit the tariff to take effect.[27] Finally, petitioners state that while SWB claims that there is competition sufficient to justify additional pricing flexibility, it has not taken advantage of some of the increased pricing flexibility already accorded it by the Commission.[28]

C. Competitive Necessity

15. *Designation Order.* In the *Designation Order,* the Bureau required SWB to explain why competitive necessity justifies its participation in a competitive bidding situation, why a customer's release of a RFP constitutes a showing of the general availability of an equal or lower priced alternative, and how discounted rates offered in response to a RFP will contribute to reasonable rates and efficient services for all users.[29]

16. *SWB's Direct Case.* SWB in its direct case claims that if it is restricted to published average prices, while competitors are allowed pricing flexibility, competitors can simply bid a sufficient amount below SWB's average prices to win the business. The result, SWB argues, is that SWB is "shut out" of the RFP process and customers do not receive the lower prices that would have been available to them.[30] SWB also claims that the existence of the RFP itself is appropriate justification for SWB's participation in the bidding process. It explains that the competitive RFP process is self-regulating and prevents undue discrimination.[31] SWB states that it assumes that the competing carrier will be subject to the same constraints under Title II of the Communications Act as SWB, making the competing offer "generally available." According to SWB, any further verification requirements would conflict with the need for bidders to respond quickly, and with the *AT&T RCI Order*.[32] Finally, SWB claims

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[27] *Id.* at 5-6; MFS Petition at 7; MHT Petition at 4-5. Petitioners allege that SWB does not make any showing that the level of competition it currently faces has grown substantially since the Commission rejected previous efforts by SWB to obtain ICB pricing. MFS Petition at 6-7.

[28] AT&T Petition at 6, fn. 11; MCI Petition at 11-12. MCI states that in Arkansas, collocation was operational in May 1995 but that SWB has not yet filed a zone density pricing plan for that area. In Oklahoma, collocation was operational in June 1995, but SWB has not filed a zone density pricing plan there either. MCI reasons that since SWB has not used this pricing flexibility, there must not be competition in those areas.

[29] *Designation Order* at ¶ 15.

[30] SWB Direct Case at 17.

[31] *Id.* at 17-18.

[32] *Id.* at 18. SWB states that in the *AT&T RCI Order*, the Commission concluded that requiring customers to disclose competitive offers was anticompetitive and not in the public interest. *Id.* at 12, citing AT&T Communications Tariff F.C.C. No. 15, Competitive Pricing

that in order to retain customers, it may need to offer a reduced price to selected customers or lose its business. SWB states that, since the reduced rate would be at or above incremental cost, some contribution to its overhead would be made with these sales. SWB concludes that some contribution to overhead is better than none.[33]

17. *Oppositions to Direct Case.* Petitioners in their oppositions state that the RFP tariff affords SWB unlimited pricing flexibility without any articulated or verifiable competitive benchmark.[34] They also state that SWB does not explain how it will ensure that an equal or lower priced offering is generally available from a competitor. The petitioners contend that SWB assumes that its prices are higher than those of a competitor, and assumes that a competitive offering is generally available, but provides no evidence to support these two assumptions sufficient to meet the competitive necessity test. In addition, petitioners claim, SWB cannot confirm even the existence of competition for a RFP from other vendors and thus cannot prove that an equal or lower priced alternative is generally available.[35] Petitioners state that while SWB claims that the discriminatory nature of the RFP tariff is checked by the marketplace itself, SWB sets rates, terms and conditions without offering any evidence of the offers of its competitors or standards with which to judge competitor's rates, terms or conditions.[36] In addition, petitioners allege that the fact that a customer has issued a RFP does not mean that a competitive situation exists, arguing that the RFP may have been issued just to discover what, if any, alternatives exist. In addition, the petitioners claim that a RFP may be issued to a vendor that neither can nor will provide the service requested. Petitioners state that only the responses to the RFP could demonstrate a potentially competitive situation, but that SWB claims that it will not obtain such information.[37] Finally, petitioners conclude, SWB has not provided any evidence that competition exists, other than its claim that the RFP itself constitutes such evidence. At most, according to petitioners, the evidence presented by SWB indicates that competition is only beginning to emerge in certain segments of the marketplace. The petitioners conclude that SWB continues to possess substantial market power.[38]

Plan No. 2 Resort Condominiums International, 6 FCC Rcd 7005 (1991)(*AT&T RCI Order*).

[33] SWB Direct Case at 19.

[34] AT&T Petition at 7.

[35] *Id.* at 8; MFS Petition at 9-10.

[36] AT&T Petition at 9.

[37] MCI Petition at 9-10; MHT Petition at 6.

[38] MHT Petition at 6; Time Warner Petition at 10-11; MCI Petition at 11, 15-19. MCI provides statistics demonstrating that SWB has not been handicapped in the marketplace.

IV. DISCUSSION

A. Tariff Language Vagueness and Ambiguity

18. As a preliminary matter, we note that the first issue raised by the Bureau in the *Suspension Order* and in the *Designation Order* concerned possible vagueness and ambiguity of the RFP tariff language. Upon our review of the tariff provisions and the comments in this proceeding, we find the tariff language to be vague and ambiguous in violation of Sections 61.2 and 61.54(j) of the Commission's Rules, which require that tariff provisions be clear and explicit.[39] SWB has failed, for example, to provide standards for determining what constitutes a "competitive bid situation" and a *bona fide* RFP. In addition, SWB sets forth in this tariff neither the types of access services available nor the corresponding rates. While we find that the RFP tariff violates Sections 61.2 and 61.54(j) of our rules, we do not rely solely on these grounds for reaching our decision. Rather, because of other concerns with the RFP tariff, we also find the RFP tariff to be unlawful on the independent grounds set forth below.

B. Tariff's Non-Compliance With ICB, Contract and Other Pricing Flexibility Rules

19. Consistent with the statutory mandate prohibiting unreasonably discriminatory rates, the Commission's rules generally require geographically averaged rates throughout a LEC's study area.[40] SWB's RFP tariff filing clearly deviates from this general requirement of geographic averaging of rates. Specifically, the general provisions of the RFP tariff would permit SWB to file in response to RFPs special rates for all services and all central offices without limitation. As proposed, these provisions confer on SWB the discretion to deaverage rates at any central office without any Commission finding that such pricing flexibility is warranted and in the public interest. In addition, the specific rates and terms proposed in Section 29.3 would allow customers served by the designated central offices to receive interstate DS3 service at lower rates then SWB currently offers under its generally available interstate special access tariff. The Commission in the past permitted certain deviations from the requirement of geographically averaged rates where it has determined the deviations are reasonable. Individual case basis (ICB) tariffs, contract carriage offerings, and zone density pricing are all examples of deviations from the principle of geographically averaged rates. As discussed below, we find that SWB's proposal does not comply with the Commission's ICB, contract carriage or other pricing flexibility exceptions to the geographic averaged rate

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[39] Section 61.2 requires that, "[i]n order to remove all doubt as to their proper application, all tariff publications must contain clear and explicit explanatory statements regarding the rates and regulations." 47 C.F.R. § 61.2. Section 61.54(j) states in part that "[t]he general rules (including definitions), regulations, exceptions, and conditions which govern the tariff must be stated clearly and definitely." 47 C.R.R. 61.54(j).

[40] *See* Section 69.3(e)(7) of the Commission's Rules, 47 C.F.R. § 69.3(e)(7).

requirement of our rules.[41]

20. We conclude that SWB's RFP tariff provisions do not properly qualify as an ICB offering under our rules. We have previously determined that dominant LECs may not offer existing DS3 services at ICB prices because such offerings are unreasonably discriminatory in violation of Section 202(a) of the Communications Act.[42] More fundamentally, we have authorized ICB prices in the past only for new service offerings for which the carrier does not have enough experience to develop averaged rates. We have stated that a LEC may use an ICB rate only as an interim measure and that averaged rates must be developed within a reasonable amount of time.[43] The general language of the proposed RFP tariff (Sections 29.1 and 29.2) is not limited to the offering of a new service. Indeed, the proposed tariff revision provides that "[t]he facilities utilized to provide these services are the same type as that used by the Telephone Company in furnishing its other tariffed services." Thus, the offerings that SWB intends to tariff in the future in Section 29 apparently are not new services, but rather services that are already generally offered. Moreover, the specific services described in Section 29.3 are DS3 services that SWB currently offers at averaged rates in the same offices identified in this section as well as other offices throughout its service territory. Therefore, the tariff revisions proposed by SWB in its transmittals do not meet any of the requirements that we have established for ICB pricing.

21. SWB's RFP proposal has some of the characteristics of a contract-type tariff.[44] We conclude, however, that under the circumstances presented here, SWB does not have authority to offer service under contract-type carriage tariffs because SWB does not meet the requirements for, and does not comply with the rules applicable to, contract carriage. First, Section 61.3 (m) of the Commission's rules defines "[c]ontract-based tariff" as a "tariff based on a service contract entered into between an interexchange carrier subject to §61.42 (a)

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[41] We note that SWB has not sought a waiver of our rules.

[42] *See* Local Exchange Carriers' Individual Case Basis DS-3 Service Offerings, Memorandum Opinion and Order, 4 FCC Rcd 8634, 8641-42 (1989) (*DS-3 ICB Order*).

[43] *Id.* at 8642; *see also* Second Further Notice of Proposed Rulemaking in CC Docket No. 94-1, Further Notice of Proposed Rulemaking in CC Docket No. 93-124, and Second Further Notice of Proposed Rulemaking in CC Docket No. 93-197, FCC 95-393 (rel. Sept. 20, 1995)(*Second Price Cap NPRM*).

[44] Such characteristics include, but are not limited to, the term for the service and the contract price for each of the services at the volume levels committed to by the customer. *See* 47 C.F.R. § 61.55.

through (c) or a nondominant carrier and a customer."[45] SWB is neither an interexchange carrier nor a nondominant carrier and is therefore precluded by our rules from offering contract carriage rates.[46] Second, even if SWB were permitted to enter into a contract-based tariff, SWB's proposed tariff provisions would violate the principle encompassed by our rules by offering the same services that it offers under price caps.[47] Section 61.55(d) of the rules provides that "[c]ontract-based tariffs of an interexchange carrier subject to price cap regulation shall not include services included in . . . [price caps]." In addition, the RFP tariff does not comply with Section 61.55's provisions regarding contract-based tariffs.[48] The general provisions of the tariff certainly do not comply with Section 61.55 as they contain none of the requirements listed in that section. Further, the rates and terms set forth in Section 29.3 do not comply with that section of our rules because, the rates and terms are not part of a contract executed by SWB and a customer, as required by our rule defining "[c]ontract-based tariff."

22. In addition to ICB pricing and contract based tariffs, the Commission has permitted limited exceptions to the requirement of geographically averaged rates within the price cap rules applicable to LECs. Generally, we have incorporated into the LEC price cap system certain flexibility in an attempt to strike a balance that permits dominant carriers to remain competitive while at the same time protecting their ratepayers and leaving open the

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[45] *See* Section 61.3 (m) of the Commission's Rules, 47 C.F.R. § 61.3 (m). Section 61.42 (a) through (c) set forth the price cap baskets and service categories applicable to each dominant interexchange carrier subject to price cap regulation. 47 C.F.R. § 61.42 (a)-(c).

[46] In any event, even in cases where we have allowed AT&T to offer some of its long-distance services pursuant to contract carriage rates, we have determined that "AT&T ... may include in its contracts only those services the Commission has found to be substantially competitive." *See* Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, Transport Phase II, 9 FCC Rcd 2718, 2731 fn. 174 (1994) (*Transport Expanded Interconnection Order*). We have not yet found that there exists sufficient competition for DS3 service, or in the interstate access market, to allow any dominant LEC to offer contract tariff rates for such offerings. *Id.*; *see also DS-3 ICB Order*, 4 FCC Rcd at 8644.

[47] *See* 47 C.F.R. § 61.55(d).

[48] Section 61.55(c) of the Commission's rules requires that "contract-based tariffs shall include the following: (1) The term of the contract, including any renewal options; (2) A brief description of each of the services provided under the contract; (3) Minimum volume commitments for each service; (4) The contract price for each service or services at the volume levels committed to by the customers; (5) A general description of any volume discounts built into the contract rate structure; and (6) A general description of other classifications, practices and regulations affecting the contract rate." 47 C.F.R. § 61.55.

opportunity for new entrants to compete.[49] We recently granted the LECs increased pricing flexibility under the price cap plan by expanding the lower band limit for the traffic-sensitive and trunking baskets from five percent to 10 percent and, in the trunking baskets density pricing zones, from 10 percent to 15 percent.[50] In addition to the general pricing flexibility built into the original price cap system, we have authorized zone density pricing, which is a significant deviation from study area averaged rates and which provides the LECs with greater ability to adjust pricing for high-traffic concentrations in a given study area once there is one collocation arrangement operational in that study area.[51] Our rules, however, also require that charges for any service subject to zone density pricing shall not be deaveraged within any zone. Our expanded interconnection rules also give LECs additional pricing flexibility through volume discounts for special access and, when certain threshold levels of competition exist, for switched transport.[52] The combined effect of these rules has been to give SWB, and other dominant LECs, a substantial degree of pricing flexibility. SWB's RFP proposal, however, would expand significantly the pricing flexibility authorized by our current rules. SWB has failed to demonstrate that the pricing flexibility it has now is not sufficient at this time to address the concerns raised by competitive entry for certain interstate access services. In this regard, it is noteworthy that SWB has not even used certain pricing flexibility (e.g., zone density pricing for DS3 services and lowered band limit under price caps) that it has already been granted by the Commission.

23. In defending its filing, SWB argues that we should allow it the same pricing flexibility as nondominant carriers, but cites no Commission precedent to support this position. Because SWB is a dominant carrier, its tariffs are subject to a higher level of scrutiny and it is subject to different regulatory procedures than a nondominant carrier. We recently reaffirmed this regulatory scheme in the *Transport Expanded Interconnection Order*, in which we rejected the LECs' suggestion that they receive the same pricing flexibility as their competitors. We noted that giving LECs too much flexibility at this stage in the development of competition could stifle entry and harm customers of less competitive services. Moreover, we expressly declined

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[49] *See* Expanded Interconnection With Local Telephone Company Facilities, CC Docket No. 91-141, Memorandum Opinion and Order, 9 FCC Rcd 5154 (1994) (*Virtual Collocation Order*); Price Cap Performance Review for Local Exchange Carriers, First Report and Order, CC Docket No. 94-1, 10 FCC Rcd 8961 (1995); *Second Price Cap NPRM*, FCC 95-393 (rel. Sept. 20, 1995).

[50] Price Cap Performance Review for Local Exchange Carriers, First Report and Order, CC Docket No. 94-1, 10 FCC Rcd 8961, 9141 (1995).

[51] *Virtual Collocation Order* at 5196. *See also* 47 C.F.R. § 69.123(c).

[52] *Virtual Collocation Order* at 5204.

to grant the LECs additional pricing flexibility.[53]

24. In sum, SWB's RFP tariff provisions violate the Commission's geographically averaged rate requirement and do not comply with our recognized deviations from that requirement. The filing does not satisfy our requirements for an ICB or contract tariff and substantially exceeds the pricing flexibilities under the current LEC price cap plan.

C. Competitive Necessity

25. SWB relies on the doctrine of "competitive necessity" as justification for its proposed RFP tariff. While Section 202(a) of the Communications Act prohibits unreasonably discriminatory rates, we have determined in other contexts that "competitive necessity" may justify the departure from a single general offering. Although SWB relies on "competitive necessity" as justification for its RFP tariff, we note that the Commission has never addressed the issue of a competitive necessity justification with respect to access services of dominant LECs. In addition, the Commission generally has addressed the issue of a competitive necessity justification in situations where there was evidence of competition for the services for which a carrier sought to justify deaveraged rates under this doctrine.[54] As noted above, we have not concluded previously, and SWB has not established here, that the existing level of competition for interstate access services should allow LECs to offer their existing services at preferential rates to select customers. Further, SWB has failed to demonstrate that the pricing flexibility it has now is not sufficient. We thus express no view as to whether a LEC could depart from our requirement of averaged rates upon a showing of competitive necessity under these circumstances. Assuming, without deciding, that such a test is available in this context, we find that SWB has not made a showing adequate to satisfy the first prong of the competitive necessity test.

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[53] *Transport Expanded Interconnection Order*, 9 FCC Rcd at 2731. *See also*, *Virtual Collocation Order*, 9 FCC Rcd 5154, in which we declined to grant the LECs additional pricing flexibility. We stated:

> We do not grant the LECs authority for broader pricing flexibility at present. We have taken a number of significant steps to increase the LECs' ability to compete with new entrants. We also recognize, however, that the LECs continue to possess substantial market power in the provision of special access and switched transport services. We believe that the ability to introduce density zone pricing and volume and term discounts under the criteria we have set is sufficient flexibility to facilitate the development of competition at this time.

Virtual Collocation Order, 9 FCC Rcd 5154.

[54] *See, e.g.*, *Private Line Guidelines Order*, 97 FCC 2d at 947.

26. Neither the general provisions of its tariff, nor the specific language, provide SWB with any support for its argument that it should be granted additional pricing flexibility based upon a "competitive necessity" justification. The *Private Line Guidelines Order* states, in part, that a carrier's proof of competitive necessity should include a showing that "an equal or lower priced competitive alternative -- a similar offering or set of offerings from other common carriers or customer-owned systems -- is generally available to customers of the discounted offering."[55] SWB has not provided sufficient evidence to satisfy this first prong of the test. The general language of Sections 29.1 and 29.2 of SWB's RFP tariff purport to confer upon SWB the discretion to respond to an RFP for any tariff service, at any central office, with individual rates. In order to satisfy the first prong of the competitive necessity test, to support these broadly drafted general provisions, SWB would have to make a showing that at each of its central offices there is a competitor with an equal or lower priced alternative. SWB has not made any such showing.

27. In addition, SWB's own definitions preclude it from satisfying the first prong of the competitive necessity test. In its Direct Case, SWB defines a "competitive bid situation" to mean that the customer has requested bids from at least one other vendor. We find that the existence of a request for proposal, even if it requests bids from more than one vendor, does not demonstrate that there is a lower priced competitive alternative. We are not persuaded by SWB's claim that, as long as the RFP states that it involves a "competitive bid situation," the existence of an RFP itself is sufficient to justify SWB's charging a RFP rate. The existence and degree of competition might be determined by the existence of *responses* to a RFP, not by the existence of the RFP itself. A RFP might be issued just to inquire about whether there are alternatives, and it might be issued to companies that are unwilling or unable to provide the requested service. Therefore, the definitions provided by SWB do not demonstrate that a lower priced competitive alternative exists

28. The specific rates and services for two central offices that are in section 29.3 of the tariff do not cure the defects we find with the general provisions of this tariff. SWB has no customer for these specific offerings since the RFPs issued by MCI were withdrawn, and SWB has not justified, as discussed above, why it should be allowed to maintain these alternative rates on file, in violation of existing Commission policies and rules.

V. CONCLUSION

29. The RFP tariff language is vague and ambiguous in violation of Sections 61.2 and 61.54(j) of the Commission's Rules, which require that tariff provisions be clear and explicit. In addition, the RFP tariff proposed by SWB violates our general rule requiring that rates be geographically averaged and does not comply with our recognized exceptions to that principle. The RFP proposal is not an ICB tariff since SWB does not propose to establish rates in this section of its tariff as an interim measure for new services. Further, while it appears that

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[55] *Id.* at 948.

SWB's proposal has some of the characteristics of a contract-type tariff, it does not have the authority to offer interstate access services under such tariffs and, in any case, the RFP proposal would not comply with our contract tariff requirements. Moreover, SWB's RFP tariff does not comply with the pricing flexibility policies that we have adopted for LECs under price cap regulation. Indeed, SWB has not demonstrated why the pricing flexibility it has now is not sufficient or why it should be entitled to additional pricing flexibility at this time. Finally, even if the competitive necessity doctrine was available to SWB to justify its departure from geographically averaged rates, SWB fails to satisfy the first prong of the competitive necessity test because it did not demonstrate that "an equal or lower priced competitive alternative . . . is generally available to customers of the discounted offering."

30. For these reasons, we conclude that SWB's proposed rates violate our rules and are unreasonably discriminatory in violation of Section 202(a) of the Communications Act and we find SWB's tariff to be unlawful.

VI. ORDERING CLAUSES

31. Accordingly, IT IS ORDERED that the request for proposal rates designated for investigation in this docket are found to be UNLAWFUL.

32. IT IS FURTHER ORDERED that Southwestern Bell Telephone Company SHALL FILE revisions removing the unlawful material and reinstating lawful material no later than 5 business days from the release of this Order to become effective on not less than one days' notice. For this purpose, Sections 61.58 and 61.59 of the Commission's rules ARE WAIVED, and Special Permission No. 95-1603 IS ASSIGNED.

33. IT IS FURTHER ORDERED that the investigation of Southwestern Bell Telephone Company's request for proposal rates in CC Docket No. 95-140 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary